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No. 82-917
IN THE

Supreme Court of the United States

October Term, 1982

KENNETH CORY, CONTROLLER OF THE STATE OF CALIFORNIA; and BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM,

Petitioners,

vs.

LESTER E. OLSON, EDWIN F. BEACH, CHARLES BIERSCHBACH, GERALD BROWN, HUGH A. EVANS, JOHN G. GABBERT, ROY L. HERNDON, MARCUS M. KAUFMAN, F. LAWRENCE PLOTKIN, EDWIN J. REGAN, JAMES B. SCOTT, and ROBERT O. STANIFORTH,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FIVE.

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Question Presented.

Whether a writ of certiorari should issue to review the correctness of a prior holding of the Supreme Court of California, which was followed by the California Court of Appeal in the present case, that a statute fixing judicial salaries created a contractual obligation which could not be abridged during the judge's term of office where: (1) the issue has been resolved by an amendment to the Constitution of California, effective January 1, 1981, thus precluding any contractual obligation from arising as to any judicial term of office commencing after that date; (2) according to the Petition for Writ of Certiorari, the holding below confers benefits, which will expire in, at most, four years, on only a few appellate justices and judicial pensioners; (3) the issue turns, in the first instance, on questions of state law, which have been determined by the highest court of the State of California; and (4) the applicable doctrines of *res judicata* and estoppel by judgment preclude relitigation of the issue presented?

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Introductory Statement.

The Petition for Writ of Certiorari ("Petition") seeks review of a decision of the Court of Appeal of the State of California which the Supreme Court of California declined to review. The decision: (1) properly followed a recent decision of the Supreme Court of California which held that a statute providing for automatic, unlimited cost-of-living salary increases for judges constituted a contractual obli-

gation that could not be abridged for the duration of the term of office of any judge to whom the statute had been applied upon the commencement of the judge's term of office; and (2) held that an amendment to the Constitution of the State of California, which specifically sought to overrule the prior decision of the Supreme Court of California and to alter California law by decreeing that statutes fixing judicial salaries are not contractual obligations, could no more abridge vested, contractual obligations than could the previously challenged statute.

The factual background of the case may be briefly summarized as follows: In 1976, the Legislature of the State of California amended a statute providing full annual cost-of-living adjustments to judges' salaries by placing a twenty-two month freeze and then a 5% limitation on such adjustments. Subsequently, in *Olson v. Cory*, 27 Cal. 3d 532, 609 P.2d 991 (1980) ("*Olson v. Cory I*"), the Supreme Court of California, construing and applying California law, held, *inter alia*, that the subject statute, as it existed immediately prior to the challenged amendment, constituted a contractual obligation, protected by the Contracts Clauses of the United States and California Constitutions, which could not be altered to reduce the cost-of-living increases payable to judges whose terms had commenced prior to the effective date of the amendment — January 1, 1977. The 5% ceiling could, however, be applied to any judge who began a new term *after* the effective date of the amendment. The Supreme Court of California expressly recognized that this holding would, for a temporary period, create some disparity in the salaries of judges, depending on when their terms began. *Olson v. Cory I, supra*, 27 Cal. 3d at 547, 609 P.2d at 1000. However, the Court held that this disparity would end for trial court judges not later than the first

Monday in January 1981, and would end for all appellate justices not later than the first Monday in January 1987.[1]

Subsequently, an amendment to the Constitution of the State of California declared, *inter alia*, that statutes fixing "salaries of judges are not considered an obligation of contract." As noted in the Petition (pp. 6-7), the amendment, effective January 1, 1981, also sought to eliminate the disparities in the salaries of the handful of appellate justices and pensioners which resulted from the holding in *Olson v. Cory I* that the 5% cost-of-living ceiling could be applied only to judges and justices whose terms of office commenced on or after January 1, 1977.

Thereafter, in *Olson v. Cory*, 134 Cal. App. 3d 85, 184 Cal. Rptr. 325 (1982) ("*Olson v. Cory II*") (Petitioners' Appendix ("Appendix") pp. 1-24), the Court of Appeal of the State of California held that the portion of the above-described constitutional amendment which specifically sought to apply the 5% limitation to judges whose terms of office commenced *before* January 1, 1977, violated the Contracts and Due Process Clauses of the United States Constitution. The Court of Appeal, citing relevant authorities (Appendix pp. 11-13), correctly reasoned that the contractual obligation which arose when the Legislature enacted a statute mandating unlimited cost-of-living increases could no more be altered by an amendment to the state constitution than by amendment of the original statute. The Court of Appeal also properly concluded (Appendix pp. 19-21) that the holding in *Olson v. Cory I*, establishing that contractual obligation, could not be relitigated to deprive respondents of their rights which were conclusively adjudicated in *Olson v. Cory I*.

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[1]In the case of appellate justices with "protected terms," such terms would end in either January 1983 or January 1987.

ARGUMENT.

A. The Issue Presented by the Petition Is Not of Sufficient Importance to Justify This Court's Review.

The petitioners do not argue that, if a contractual obligation arose under a California statute providing annual cost-of-living salary adjustments for judges, the California courts erroneously applied the Contracts Clause of the United States Constitution. Rather, petitioners essentially seek a review and reversal of the holding of the Supreme Court of California in *Olson v. Cory I*, which construed such a California statute as creating a contractual obligation. The review sought by petitioners is of limited significance, however, because by amendment of the Constitution of the State of California, effective January 1, 1981: "Laws setting the salaries of judges shall not constitute an obligation of contract. . . ." (Appendix p. 2.)

While for a short period of time, ending not later than January 1987, the holding in *Olson v. Cory I* will continue to have some restricted effect, it is clear that no new "protected terms" can arise after January 1, 1981, due to the amendment of the California Constitution. Thus, contrary to petitioners' assertions, and within a limited period of time, there will be no restriction, pursuant to either *Olson v. Cory I* or *Olson v. Cory II*, on the power "of the State Legislature and the People of the State of California to prospectively adjust compensation during a term of office." (Petition p. 11.)

Perhaps recognizing that the issue they seek to have reviewed is not of sufficient importance to warrant review by this Court, petitioners appear to suggest that the salary disparity which benefits the few justices and judicial pensioners who will continue to have their salaries and pensions fixed

in accordance with the holding in *Olson v. Cory I*,[2] in and of itself, provides a basis for review. (Petition pp. 11-12.) Surely, the Supreme Court of the United States does not sit to correct temporary disparities in the salaries of state court judges, which do not involve any significant issue of law, and have been adjudicated by a decision of the highest court of the State of California.

B. The Federal Constitutional Issue Presented Turns on a Question of *State* Law Which Has Been Resolved by the California Courts in Accordance With the Applicable Decisions of This Court.

As petitioners expressly concede (Petition p. 13), quoting from *State of Indiana Ex Rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938), in considering whether a state statute impairs the obligation of a contract under the federal constitution, the existence of the contract, while a federal question, is "to be determined 'by an appraisal of the statutes of the state and the decisions of its courts.' " Accordingly, the issue presented by the Petition turns, in the first instance, on the scope of review applicable to the holding of the Supreme Court of California in *Olson v. Cory I* — interpreting California law — that a statute enacted by the Legislature of the State of California created a contractual obligation. Moreover, petitioners' assertions that the holding of *Olson v. Cory I* — that a contractual obligation exists

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[2]As the Petition correctly states (pp. 6-7), there were only four Supreme Court justices and twenty-three justices of the Courts of Appeal (and at the most an equal number of judicial pensioners), who were held to have "protected terms" under *Olson v. Cory I* and were thus entitled to full cost-of-living increases until the end of their terms in January 1983 or January 1987. It was this small group whose salaries (and pensions) were sought to be equalized by the constitutional amendment which took effect on January 1, 1981. (Petition pp. 6-7, 11-12.) Due to the completion of terms, retirements and deaths, this group will have been reduced, as of January 3, 1983, to one Supreme Court justice, nine Court of Appeal justices and not more than ten judicial pensioners.

— "is not binding on this court" (Petition p. 12) and is in conflict with prior decisions of this Court (*id.*) are simply misguided and reflect petitioners' apparent inability to comprehend fully the hybrid nature of issues involving application of the Contracts Clause.

This Court has long held that "where a statute is claimed to create a contractual right," it must give "weight to the construction of the statute by the courts of the state," and, "[u]nless these views are *palpably erroneous* . . . [it] should accept them."[3] *Phelps v. Board of Education*, 300 U.S. 319, 322-323 (1937). *See also Dodge v. Board of Education*, 302 U.S. 74, 79 (1937). Petitioners have not cited (nor have respondents discovered) a single decision in which, under the Contracts Clause of the United States Constitution, this Court has reversed a state court judgment holding that contractual rights existed under the applicable state law and that they were unconstitutionally impaired. Indeed, the cases cited by petitioners involve review of state court determinations that a contract *did not* exist. Because

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[3]This standard of review is most severely restricted when matters of local policy are at issue. As Mr. Justice Frankfurter observed in *Atlantic Coast Line R. Co. v. Phillips*, 332 U.S. 168, 170 (1947):

> [W]hile it is true that we are not bound by the construction of local statutes by the local courts in deciding the . . . question [of whether an obligation of contract has been impaired in violation of the Contracts Clause], 'yet when we are dealing with a matter of local policy, like a system of taxation, we should be slow to depart from their judgment, if there was no real oppression or manifest wrong in the result.'

This case, as petitioners concede, involves a similar matter of local policy. As petitioners observe: "The relationship between a state and its employees, officers and judges is a matter that should peculiarly rest with the people of that state. . . ." (Petition p. 12.) The decision of the Supreme Court of California that a contractual obligation was created by a statutory scheme which was aimed at keeping judicial salaries current with the rate of inflation hardly creates "real oppression or manifest wrong in the result" and plainly does not undermine the values reflected by the Contracts Clause.

such holdings — if given controlling effect — could make the Contracts Clause a "dead letter" by determining that no protectable contract rights exist under state law, they cannot be regarded as "binding" on this Court, even though they will be accorded "great weight." *State of Indiana Ex Rel. Anderson v. Brand, supra*, 303 U.S. at 100. In the present case, however, the Supreme Court of California found that a contractual obligation existed under the laws of the State of California, and it enforced that obligation in accordance with the dictates of the Contracts Clause. It is thus unnecessary for this Court to exercise its discretionary jurisdiction to determine whether the Supreme Court of California was "evad[ing] the restraint of the [Contracts] Clause by determining, through legislation or adjudication, that an arrangement previously regarded as a contract was no longer enforceable." *Pineman v. Oechslin*, 637 F.2d 601, 604 (2d Cir. 1981).

Furthermore, and despite petitioners' contrary contentions, the holdings of the California Supreme Court and Court of Appeal in *Olson v. Cory I* and *Olson v. Cory II* are not in conflict with this Court's decisions in *United States v. Will*, 449 U.S. 200 (1980); *Dodge v. Board of Education*, 302 U.S. 74 (1937); and *Butler v. Pennsylvania*, 51 U.S. 402 (1850). Petitioners' citation of *United States v. Will, supra*, is simply inapposite, because that case dealt with the construction of *federal statutes* providing for compensation of federal judges in the light of the Compensation Clause (Article III, Section 1) of the United States Constitution and *not* the Contracts Clause. *Dodge* and *Butler* hold only that the Contracts Clause of the United States Constitution creates no *independent* contractual right to public office or compensation therefor. If, as in *Dodge* and *Butler*, no such right exists under state law, the federal Contracts Clause does not create that right. On the other hand, if such

a right exists as a matter of state law, a federal court will enforce it, and *Dodge* and *Butler* do not hold to the contrary.

Thus, in *Dodge v. Board of Education, supra*, 302 U.S. 74, the United States Supreme Court affirmed the holding of the Illinois Supreme Court that teachers' pension rights created by Illinois statute were not vested rights *under Illinois law* and, therefore, were not protected from modification or elimination by the Contracts Clause of the United States Constitution. Similarly, in *Butler v. Pennsylvania, supra*, 51 U.S. 402, this Court, analyzing Pennsylvania law, affirmed the holding of the Pennsylvania Supreme Court that canal commissioners appointed and compensated pursuant to Pennsylvania statutes did not have vested rights *under Pennsylvania law* to promised compensation.

In sum, in determining whether respondents have contractual rights to their promised compensation, this Court must look to California law, as previously pronounced by the California Supreme Court in *Olson v. Cory I*,[4] and not to federal decisions dealing with public employees' rights to salary and pensions in other states or the federal system. It is clear that respondents have vested, contractual rights

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[4]A long line of California cases, culminating in *Olson v. Cory I*, has firmly established, under California law, "the principle that a public employee's pension rights are an integral element of compensation and a vested contractual right accruing upon acceptance of employment"; and such rights are protected by the Contracts Clause of the United States Constitution. *Olson v. Cory I, supra*, 27 Cal. 3d at 540, 609 P.2d at 996. *See also Betts v. Board of Administration*, 21 Cal. 3d 859, 582 P.2d 614 (1978); *Kern v. City of Long Beach*, 29 Cal. 2d 848, 179 P.2d 799 (1947); *Lyon v. Flournoy*, 271 Cal. App. 2d 774, 76 Cal. Rptr. 869 (1969); *Frank v. Board of Administration*, 56 Cal. App. 3d 236, 128 Cal. Rptr. 378 (1976). In *Olson v. Cory I*, the Supreme Court of California, relying on these and other relevant cases and distinguishing various earlier California decisions, concluded that a judge's promised compensation is also protected by the Contracts Clause of the United States Constitution. *See Olson v. Cory I, supra*, 27 Cal. 3d at 538, 538 n. 3, 540-542, and 540 n. 4, 609 P.2d at 994, 994-995 n. 3, 995-997, and 995 n. 4.

to their compensation under California law, and that such rights, having come into existence under California law, are protected by the Contracts Clause of the United States Constitution.[5]

C. The Doctrines of *Res Judicata* and Estoppel by Judgment Preclude Petitioners From Relitigating the Federal Constitutional Issues Conclusively and Finally Adjudicated in Respondents' Favor in *Olson v. Cory I*.

The judgment in *Olson v. Cory I* adjudicated, *inter alia*, that a few appellate justices had vested rights to full cost-of-living salary increases until the end of their terms in January 1983 or January 1987. That judgment became final in June 1980. Those justices and a small number of judicial pensioners, whose pensions are calculated as a percentage of such justices' salaries, have been paid the full amount of cost-of-living increases due from September 1977 to January 1981. The only unexecuted part of the judgment is the money due them which has been withheld by the state because of the constitutional amendment, effective January 1, 1981, pending the adjudication of the case at bench.

Under principles of *res judicata* and estoppel by judgment properly applied by the Court of Appeal in this case (Appendix pp. 19-22), and recognized by this Court in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981):

> A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. . . . Nor

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[5]Respondents believe that their discussion of the Contracts Clause issue also disposes of the Due Process Clause issue. With respect to the Due Process Clause issue, reference is also made to the disposition of this issue by the Court of Appeal. (*See* Appendix pp. 16-18.)

> are the res judicata consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case. . . . We have observed that '[t]he indulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of res judicata to avert.'

As pointed out by the Court of Appeal, a subsequent state constitutional amendment does not constitute such a change in the "applicable legal context" as to preclude application of the doctrines of *res judicata* and estoppel by judgment with respect to the federal constitutional issue. (*See* Appendix pp. 11-13, 19-20.) Moreover, in accordance with the principles enunciated in *Federated Department Stores, Inc. v. Moitie, supra*, even if this Court were to review the case at bench and determine that the Supreme Court of California had incorrectly determined the federal constitutional issue in *Olson v. Cory I*, such a determination would not preclude application of the doctrines of *res judicata* and estoppel by judgment to enforce the final judgment in favor of respondents in *Olson v. Cory I*.

Conclusion.

For the reasons set forth above, it is submitted that the Petition should be denied.

Respectfully submitted,

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